

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)

Junk Fax Prevention Act of 2005)

CG Docket No. 02-278

CG Docket No. 05-338

TO: The Commission

**REPLY COMMENTS OF THE
FAX BAN COALITION**

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SUMMARY

On December 9, 2005, the Commission issued a Notice of Proposed Rulemaking seeking comment on proposed modifications to the Commission's rules on unsolicited facsimile advertisements. Scores of commenters, including large and small businesses representing many industries, filed comments supporting the Commission's efforts to establish a workable framework for the regulation of commercial faxes under the Junk Fax Prevention Act of 2005 (the "JFPA"). As these commenters explained, Congress's fundamental purpose in adopting the JFPA was to strike a more appropriate balance between protecting privacy interests and avoiding unnecessary and burdensome restrictions on the legitimate communications of American businesses. The Fax Ban Coalition (the "Coalition"), a group of nearly eighty American businesses and trade organizations, files these Reply Comments to emphasize the importance of adopting rules that are consistent with this primary goal.

The Coalition, along with virtually all of the commenters in this proceeding, urges the Commission to adopt regulations that both respect this goal and are straightforward enough so senders in all segments of the American economy will be able to comply. Specifically, the Coalition supports the Commission's proposed definition of the term "established business relationship" and the Commission's proposed elimination of the "signed, written statement" requirement. The Coalition warns, however, that the Commission would be acting contrary to will of Congress if it were to impose time limits on EBRs at this time.

Further, the Coalition encourages the Commission not to impose unnecessary or burdensome requirements for demonstrating that a fax is compliant with the JFPA's EBR requirements. Specifically, to the extent that the Commission decides to

elaborate on the statutory requirement (which may be unnecessary), it should identify non-exclusive “safe harbor” situations in which a fax number will be deemed to have been provided within the context of an EBR and situations in which the number will be deemed to have been “voluntarily” provided. Given the diversity of industries which use fax technology for routine communication, however, the Commission should not adopt an exclusive test since any requirement likely would be over- or under-inclusive.

Similarly, there is no need for the Commission to specifically obligate senders to verify that directory information was voluntarily provided or that an EBR existed before July 9, 2005. In light of the federal law’s private suit provisions, which have produced an active plaintiffs’ bar and several companies that actively solicit faxes from recipients along with assignment of the right to sue (often in the context of gathering plaintiffs for class action suits), senders will make reasonable efforts to demonstrate these facts without the Commission imposing specific requirements.

Finally, the Coalition urges the Commission to adopt reasonable and straightforward rules with regard to the opt-out provisions of the JFPA, both in the area of notice requirements and in defining how opt-outs should be handled under various circumstances.

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INTRODUCTION

On December 9, 2005, the Commission issued a Notice of Proposed Rulemaking seeking comment on proposed modifications to the Commission's rules on unsolicited facsimile advertisements.¹ Scores of commenters, including large and small businesses representing various sectors of the American economy, filed comments supporting the Commission's efforts to establish a workable framework for the regulation of commercial faxes under the Junk Fax Prevention Act of 2005 (the "JFPA").² These commenters made clear that Congress's fundamental purpose in adopting the JFPA was to strike a more appropriate balance between protecting privacy interests and avoiding unnecessary and burdensome restrictions on the legitimate communications of American businesses. The Fax Ban Coalition (the "Coalition"), a group of nearly eighty American

¹ *Rules & Regulations Implementing the Telephone Consumer Protection Act*, Notice of Proposed Rulemaking & Order, CG Docket Nos. 02-278 & 05-338, FCC 05-206 (rel. Dec. 9, 2005) ("Notice").

² Pub L. No. 109-21, 119 Stat. 359 (2005).

businesses and trade organizations, files these Reply Comments to emphasize the importance of adopting rules consistent with the goals of the JFPA and to highlight those areas in which industry commenters are in clear agreement.

BACKGROUND

The Fax Ban Coalition (the “Coalition”) is comprised of a diverse group of small and large businesses and other organizations active in a variety of industries.³ Coalition members include mortgage bankers and brokers, health care providers, real estate professionals, magazine publishers, trade show operators, restaurateurs, travel agents, attorneys, insurance agents, car dealers, and scores of other small businesses and professionals that form the core of the American economy. The Coalition’s members rely heavily on fax technology in their day-to-day work as both senders and recipients of commercial faxes. Although they recognize the need for regulation to protect themselves and others from unsolicited faxes, the Coalition members urge the Commission to adopt rules narrowly tailored to the statute in order to avoid burdening legitimate business activities conducted by fax.

DISCUSSION

I. THE ESTABLISHED BUSINESS RELATIONSHIP EXEMPTION IS CRITICAL TO THE SUCCESS OF THE COMMERCIAL FAX RULE.

The established business relationship (“EBR”) exception to the JFPA’s overall prohibition against unsolicited commercial faxes is the cornerstone of Congress’s decision to ensure that legitimate business activities are not unreasonably impaired by the Commission’s fax rules.⁴ To give effect to Congress’s intent in this regard, the

³ A list of the members of the Fax Ban Coalition is attached as Appendix A.

⁴ See, e.g., *NAW Comments* at 3; *NNA/NAA Comments* at 3-6.

Commission must take care to adopt rules that impose requirements that are easily implemented and do not interfere with businesses' ability to send legitimate faxes.

A. Imposition of Time Limits on EBRs

The vast majority of comments⁵ strongly opposed the Commission's proposal to impose time limitations at this juncture on EBRs.⁶ The most common criticism was that it is premature for the Commission to consider the imposition of EBR time limits immediately after the bill was enacted, when Congress itself had declined to do so. Some commenters explained that imposing new limitations now would be contrary to the JFPA's requirement that the Commission make several specific, factual determinations before imposing any new time limitations.⁷ Others argued that there was no evidence (e.g., a significant number of recipient complaints) to justify such new

⁵ A list of the comments cited in the Fax Ban Coalition's Reply Comments is attached as Appendix B.

⁶ See *ACB Comments* at 2-3; *American Bankers Association Comments* at 4; *American Bar Association Comments* at 3-4; *ABM Comments* at 8; *AFSA Comments* at 2-3; *AHLA Comments* at 4 (proposing "lengthy limitation"); *ARTBA Comments* at 2; *ASTA Comments* at 8-9; *ATA Comments* at 3; *Bank of America Comments* at 2; *CTTC Comments* at 1; *CBA Comments* at 9-11; *DMA Comments* at 8; *Everett Comments* at 4-5; *Huntington Comments* at 1-3; *IFDA Comments* at 3-4; *Lorman Comments* at 10-16; *NAR Comments* at 5-7; *NAW Comments* at 6-10; *NADA Comments* at 1-2; *NFIB Comments* at 1-3; *NMHC Comments* at 1-2; *NNA/NAA Comments* at 10-12; *NEPA Comments* at 5; *SBA Comments* at 6-7; *Reed Elsevier Comments* at 3-6; *SIA Comments* at 2; *Staples Comments* at 4-5; *YPA Comments* at 3-5; *MFC Comments* at 6-10.

But see *SAG Comments* at 11-12; *Biggerstaff Comments* at 19; *Comerica Comments* at 1; *HPC Comments* at 3; *Independent Sector Comments* at 1-2; *SHRM Comments* at 7-8 (proposing longer limits for trade associations); *Strang Comments* at 4; *Sutton Comments* at 6.

⁷ *American Bar Association Comments* at 3-4; *ABM Comments* at 8; *ASTA Comments* at 8-9; *CBA Comments* at 9-11; *Huntington Comments* at 1-3; *IFDA Comments* at 3-4; *NAR Comments* at 5-7; *NAW Comments* at 6-10; *NADA Comments* at 1-2; *NFIB Comments* at 1-2; *NNA/NAA Comments* at 10-12; *SBA Comments* at 6-7; *Reed Elsevier Comments* at 3-6; *Staples Comments* at 4-5; *YPA Comments* at 3-5; *MFC Comments* at 6-10.

limitations.⁸ Finally, several commenters cited the substantial burdens that altered time limitations would impose on their business relationships.⁹

The Coalition agrees with the broad consensus that imposing time limitations at this point would be inconsistent with the JFPA. In fact, the Coalition submits that the plain language of the JFPA actually prohibits the Commission from taking action at this time.

Specifically, the JFPA provides:

[B]efore establishing any . . . limits [on the duration of the EBR], the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

⁸ *Bank of America Comments* at 2; *DMA Comments* at 8; *Lorman Comments* at 10-12; *NEPA Comments* at 5; *SIA Comments* at 2.

⁹ *AFSA Comments* at 2-3; *ARTBA Comments* at 2; *Everett Comments* at 4-5; *Lorman Comments* at 12-14; *NAW Comments* at 7-10; *NADA Comments* at 1-2; *NFIB Comments* at 1-3; *SBA Comments* at 6-7.

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome. . . .¹⁰

Although the JFPA grants the Commission authority to impose time limitations on EBRs, it stipulates that the Commission “*shall*” make these factual determinations “*before* establishing any limitations.” Because these initial factual determinations are conditions precedent for the Commission altering the duration of the Congressionally-adopted EBR, the Commission cannot consider imposing time limitations until *after* it has made these determinations.

The *Notice*, however, provides no indication that the Commission has taken action on any one of these four requirements. Indeed, it is likely impossible for the Commission to make these detailed factual determinations in time to comply with the April 5 deadline (much less determine the potential economic consequences of any proposed time limitations). To act now without first establishing a proper record would not only run contrary to the statutory requirements, it also would constitute an arbitrary and capricious exercise of authority.

This reading is consistent with both the legislative history and common sense. As commenter Lorman Education Services (“Lorman”) explained, Congress intended for the Commission to (1) implement the new EBR rules, and then (2) after some period of time has lapsed, evaluate how the rules were working before considering time limitations.¹¹ This formulation is how Congress generally operates: adopt a new law, allow experience to accumulate, and then see if change is warranted. Indeed, that is

¹⁰ *JFPA*, Sec. 2(f) (emphases added).

¹¹ *Lorman Comments* at 10-12.

precisely what one of the chief House architects of the JFPA and the sponsor of the original TCPA (Rep. Ed Markey) expressly envisioned:

The [JFPA] will permit the Commission to put in place a [duration limit on] the established business relationship, *after the FCC implements the new opt-out policy and it gets a track record on what is happening in the marketplace.* In particular, the *Commission will examine consumer complaints to the agency during this period* with an analysis as to whether junk faxes [cause] a significant number of complaints.¹²

Because the Commission has not yet made the required factual determinations, it would be both premature and inconsistent with the statutory requirements of the JFPA to consider time limitations in this rulemaking. Instead, the Commission should — consistent with Congressional intent — (1) implement the new EBR rules, (2) evaluate the consequences, and (3) then determine whether further rulemakings are necessary.

The Commission cannot satisfy these plain-language statutory requirements by reviewing the effects of prior EBR rules nor by seeking to adopt determinations contemporaneous with a change to the EBR duration period. Section 2(f) of the JFPA (amending § 227(b)(2)(G)) requires the Commission to evaluate the effect of the exception created “in paragraph 1(C).”¹³ Which is to say, the Commission must evaluate the EBR exception which it is now just implementing. Since that exception is just now being implemented by the Commission, there can be no experience under the Commission’s rules. Note that the JFPA does not ask the Commission to review the

¹² *Id.* at 11 (citing 150 Cong. Rec. H6089-02, speech of Congressman Markey) (emphasis added).

¹³ *JFPA*, Sec. 2(f).

effects of the EBR rules in place from 1992 to 2003.¹⁴ If Congress had intended the Commission to review those prior rules, it would have referred to them explicitly, similarly to the way that Section 2(b) of the JFPA explicitly references the rules that existed on January 1, 2003.¹⁵ Accordingly, the Commission is obligated to implement the rules Congress dictated and only then assess whether change is needed. Any step to change the EBR duration now would be premature and contrary to the statute.

B. Definition of “Established Business Relationship”

Throughout the numerous comments filed by businesses in response to the Commission’s *Notice*, one fundamental theme is clear: the regulations implementing the EBR should be clear-cut and readily understandable. Given the importance of the EBR to the statutory scheme recently adopted by Congress, commenters urged the Commission to adopt regulations that would fulfill Congress’s goal of protecting fax recipients without burdening legitimate businesses. Thus, the FCC’s fax rule should regulate commercial faxes in a sensible manner without imposing burdensome requirements that render the use of fax technology unrealistic for most businesses.¹⁶

The JFPA was adopted in direct response to the concern that the Commission’s July 2003 reversal of its longstanding position on EBR had created an untenable structure for American businesses.¹⁷ The Commission’s abrupt change, Congress found, would have imposed costly and unnecessary obligations on small and

¹⁴ In any event, experience under those rules is likely to be quite different from the experience under the new law and regulations since there was no opt-out requirement.

¹⁵ *JFPA*, Sec. 2(b).

¹⁶ *American Bankers Association Comments* at 3.

¹⁷ *NAR Comments* at 2; *Lorman Comments* at 6-7.

large organizations seeking to conduct routine business.¹⁸ For that reason, Congress used the JFPA to codify the EBR, and thus ease these burdens by exempting from Section 227's fax prohibition messages sent to a recipient with whom the sender has an established business relationship.¹⁹

As the record demonstrates, businesses continue to rely heavily on fax messaging. For instance, faxes are used by financial institutions to distribute "rate sheets" and other information,²⁰ by hotels to communicate with potential customers and suppliers,²¹ by travel agents to communicate with travelers,²² and by scores of other industries for a great variety of purposes. This diverse range of uses across a variety of business relationships does not lend itself well to detailed regulation, and thus counsels caution as the Commission seeks to write rules in this area.

The Commission's proposed definition of an EBR effectuates the intent of Congress, and accordingly many commenters supported the proposed formulation.²³

¹⁸ See, e.g., *Junk Fax Prevention Act of 2005*, Hearing Before the Senate Subcommittee on Trade, Tourism & Econ. Dev., 109th Cong. (Apr. 13, 2005) (statement of Sen. Smith).

¹⁹ JFPA, Sec. 2(a).

²⁰ *ACB Comments* at 2; *AFSA Comments* at 1-2; *MFC Comments* at 5-6.

²¹ *AHLA Comments* at 2.

²² *ASTA Comments* at 3-4.

²³ The Commission proposed that the term "established business relationship" should be defined as:

a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

Commenters generally found this definition to be straightforward and readily understandable, and believed that it properly encompasses a variety of relationships which should be included within the exemption.²⁴

One of the few proposed changes to the EBR definition is the suggestion by the Attorneys General that a sender should not be permitted to “transfer” an EBR to a fax transmitting service.²⁵ This request should be rejected, since it is at odds with how the private sector generally operates. Just as businesses contract with Internet companies to provide e-mail service, or with an overnight delivery service to deliver packages, many companies use fax transmission services as an efficient instrumentality for the delivery of fax messages. There is simply no logical or legal basis to distinguish between a fax physically transmitted by an employee of the sender and the same fax that is physically transmitted by a transmitting service used by the sender. These two faxes are, from the perspective of the recipient, interchangeable, and limiting the EBR in this way would do nothing but impose unwarranted costs on senders and, in particular, on smaller businesses.²⁶

Notice at ¶ 14 (citing 47 C.F.R. § 64.1200(f)(4)).

²⁴ See, e.g., *DMA Comments* at 6-7; *NEPA Comments* at 4. Several commenters emphasized that the Commission should specifically recognize the unique relationship between lenders and intermediaries in the context of an EBR. *Bank of America Comments* at 2; *CBA Comments* at 6-9. The Coalition encourages the Commission to recognize that these relationships fit within the existing EBR definition.

²⁵ *SAG Comments* at 11.

²⁶ This request mischaracterizes the role of a fax transmitter, which is simply acting as an instrumentality for the sender of the fax. Any EBR would apply only to faxes transmitted by the transmitter on behalf of a sender that has an EBR with the specific recipient. The Coalition does not understand any commenter to be proposing that fax transmitting firms should inherit all of their clients’ EBRs and be able to transfer those EBRs to other clients.

C. Prior Express Invitation or Permission

The Commission's rules adopted in July 2003 (but stayed in part) provide that a fax message is not unsolicited if "the recipient has granted the sender prior express invitation or permission to deliver" the message, and specify that the invitation or permission must take the form of a "signed, written statement."²⁷ Congress overruled this conclusion in part, finding that an EBR evidences prior express invitation or permission.²⁸ The Commission's July 2003 decision sparked immediate controversy when it was adopted, and several Petitions for Reconsideration are still pending on this issue, which the Commission should address.²⁹ The commenters that have addressed the issue are nearly unanimous that this requirement is unworkable in its current form.³⁰ The JFPA's addition of the words "in writing or otherwise" to the consent requirement of Section 227(a)(5)³¹ at minimum compels the Commission to eliminate the "signed,

²⁷ 47 C.F.R. 64.1200(a)(3)(i). The Commission has stayed the signed, written consent requirement several times, and it is not yet effective.

²⁸ 151 Cong. Rec. H5262-04, H5264 (remarks of Rep. Upton) (daily ed. Jun. 28, 2005) (noting that, without the JFPA, "the cost of complying with the FCC's . . . rules [would] be enormous, and [absent the EBR exemption, the law would] severely hamper legitimate fax communications between businesses and their customers and between associations and their members").

²⁹ See *Petitions for Reconsideration & Clarification of Action in Rulemaking Proceeding*, Public Notice, Report No. 2627, CG Docket No. 02-278 (rel. Sep. 8, 2003). Many of these petitions address issues related to this provision, and the Commission could resolve those issues by granting the petitions.

³⁰ See, e.g., *ACA Comments* at 4-5; *ARTBA Comments* at 1; *ASTA Comments* at 6; *Everett Comments* at 3; *Huntington Comments* at 7; *NNA/NAA Comments* at 7; *NAEDA Comments* at 1-2; *Westfax Comments* at 5. See also *Notice* at ¶ 9.

³¹ JFPA, Sec. 2(g).

written statement” requirement associated with the “prior express invitation or permission” provision.³²

II. THE COMMISSION SHOULD NOT IMPOSE UNNECESSARY AND BURDENSOME REQUIREMENTS FOR DEMONSTRATING THAT A FAX IS COMPLIANT WITH THE JFPA’S EBR REQUIREMENTS.

A. Parameters For Provision of a Fax Number Within an EBR

The same concern that caused many commenters to support the Commission’s proposed EBR definition proposal,³³ however, has led many to oppose the Commission’s proposed imposition of “parameters defining what it means . . . to provide a facsimile number ‘within the context of [an] established business relationship.’”³⁴ In light of the diverse range of business relationships and fax communications governed by the JFPA’s EBR exception, the Commission should exercise caution, since specific parameters necessarily would be both under- and over-inclusive and would burden legitimate fax communications methods across a number of industries.³⁵

This same caution, informed by the inherent risk of any line-drawing, casts serious doubt on the feasibility of any effort to define when a fax number is or is not

³² If the Commission adopts an overly limited definition of the established business relationship, *see, e.g., SAG Comments* at 8-9, it is crucial that some mechanism remains for senders which enjoy informal, non-contractual business relationships to send business faxes pursuant to invitation or permission from the recipient.

³³ *See* Section I(A), *supra*.

³⁴ *Notice* at ¶ 10 (citing JFPA, Sec. 2(a)). Provision of a fax number within the context of an EBR is relevant because, in order for a fax to be within the EBR exemption, the sender must have “obtained the number of the [recipient’s] telephone facsimile machine through . . . the voluntary communication of such number, within the context of such established business relationship, or . . . a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution.” JFPA, Sec. 2(a).

³⁵ *ABM Comments* at 5.

provided within the context of an EBR.³⁶ As a result, the Coalition opposes any effort to specify particular circumstances under which a fax number is permissibly provided. If the Commission feels compelled to provide some guidance in this area, the Commission at most should provide a list of specific circumstances – or “safe harbors” – in which it will be presumed that faxes were sent in the context of an EBR. This list should, of course, be illustrative and not exclusive.

Commenters that supported more specific rulemaking in this area cautioned that any parameters should be simple and straightforward.³⁷ They also urged the Commission to subject any proposed parameters to further notice-and-comment proceedings in order to allow the affected industries to fully inform the Commission of the practical consequences of its proposals.³⁸ The Coalition encourages the Commission to follow both of these guidelines, as they are important to the success of the EBR exemption and, indeed, to the JFPA itself.

B. Verifying Directory Information

Commenters were overwhelmingly opposed to the Commission’s proposal to require senders to take additional efforts to confirm that numbers maintained in public

³⁶ EPIC suggests that a fax number should not be provided within the context of an EBR unless the recipient “has explicitly stated that [he or she] wish[es] to receive unsolicited commercial messages.” *EPIC Comments* at 1; *see also Biggerstaff Comments* at 17. But EPIC’s proposal misunderstands the nature of the EBR exemption: In 2005, Congress created the EBR in the JFPA in order to *avoid* the necessity for explicit permission which was then scheduled to go into effect. In other words, Congress intended that the EBR itself would take the place of “express invitation or permission,” a provision to which Congress, in any case, has appended a specific EBR exemption.

³⁷ *American Bankers Association Comments* at 3.

³⁸ *ASTA Comments* at 6.

directories were voluntarily made available.³⁹ Many thought that this issue was beyond the Commission's purview and expertise, and that the Commission had little to add to the statutory language.⁴⁰ Moreover, many commenters objected that this requirement would impose substantial and unnecessary burdens on senders.⁴¹ For example, senders would potentially have to contact individual recipients or compilers and inquire about how their numbers were obtained. Other commenters complained that the requirements would be unworkable.⁴² For instance, what if the compiler did not cooperate?

Finally, several commenters noted that imposing burdensome investigation and confirmation requirements would defeat the purpose – and the financial benefit – of using third-party lists.⁴³ When the lists are gathered and used appropriately, they provide substantial benefits for senders in the form of reduced administrative costs. The Commission's proposed requirements would effectively eliminate those benefits.

The Coalition agrees with the strong consensus that specific obligations for verifying directory information would be costly and would provide very little incremental benefit to recipients. If the Commission feels compelled to address this issue, the Coalition urges that a sender must be able to rely on a reasonable belief that a

³⁹ *ACA Comments* at 7-8; *American Bankers Association Comments* at 3; *AFSA Comments* at 4; *ASTA Comments* at 6-7; *Bank of America Comments* at 3; *CBA Comments* at 5-6; *Everett Comments* at 5-6; *Huntington Comments* at 6; *NAW Comments* at 5-6; *Reed Elsevier Comments* at 8; *SLA Comments* at 4; *YPA Comments* at 2-3. *But see ABM Comments* at 5-6 (stating that any requirements should not include contacting the compiler).

⁴⁰ *Lorman Comments* at 7-9.

⁴¹ *CBA Comments* at 5-6; *Huntington Comments* at 6; *NAW Comments* at 5; *SLA Comments* at 4; *YPA Comments* at 2-3.

⁴² *NAW Comments* at 5-6.

⁴³ *ASTA Comments* at 6-7; *Everett Comments* at 5-6.

specified fax number was voluntarily provided to a directory for public disclosure.⁴⁴

Such a requirement would prevent malicious senders from harvesting private directories with impunity, but also would permit legitimate senders to engage in a case-by-case analysis of whether it is reasonable to believe that the fax numbers were voluntarily provided for public use. Of course, if the Commission decides to adopt this or any other proposal relating to directory information, it should only do so after initiating a new rulemaking that would allow it to grasp the economic costs and consequences of subjecting senders to these requirements.

C. Defining “Voluntarily”

Commenters generally opposed adopting rules that attempt to enumerate the circumstances in which a recipient has “voluntarily agreed to make available its facsimile number” in the context of an EBR.⁴⁵ A common concern was that any definition would necessarily be incomplete in light of the complexities of business relationships.⁴⁶ Other commenters questioned whether Congress intended for the Commission to provide further definitions here.⁴⁷ The most common response was that,

⁴⁴ The Attorneys General claim that, without a “due diligence” requirement, senders would be able to harvest fax numbers from alumni directories with impunity. *SAG Comments* at 10. The Coalition agrees that, where alumni directories are published for personal use, included fax numbers should not be considered to be voluntarily publicized. The “private use” notice that is contained in most alumni directories, *see SAG Comments* at 10, would be enough to defeat any sender’s reasonable belief that the fax numbers were voluntarily placed in the directory for public use.

⁴⁵ *See ABM Comments* at 6; *CBA Comments* at 4-6; *Lorman Comments* at 16-18; *NAR Comments* at 3-4; *MFC Comments* at 11-12. *But see Biggerstaff Comments* at 14-19; *EPIC Comments* at 1-3.

⁴⁶ *ABM Comments* at 6; *CBA Comments* at 4-6; *NAR Comments* at 3-4; *MFC Comments* at 11-12.

⁴⁷ *Lorman Comments* at 9-10; *MFC Comments* at 11.

rather than attempt to provide comprehensive definitions, the Commission should identify certain circumstances — or safe harbors — that create a presumption that a fax number was “voluntarily” made available but leave open the door for other mechanisms to establish that fact.⁴⁸

With respect to defining “voluntarily,” the Coalition agrees with the consensus that the Commission should not attempt to provide overly specific definitions. As the National Association of Realtors (NAR) explained, “[W]hether an act is ‘voluntary’ turns on the state of mind of the actor, and administrative and judicial efficiency counsels against any procedure that requires delving into the state of mind of the recipient.”⁴⁹ Indeed, the Commission lacks any institutional expertise to prescribe definitions here given that “voluntariness” turns on an individual’s subjective intent. Further, it is likely that no definition could encompass the endless number of ways that voluntariness could be established within different types of EBRs.

The Coalition also agrees with commenters who recommended that the Commission provide safe harbors that would presumptively establish “voluntariness” in the context of an EBR. The safe harbors would not only provide guidance to senders, they would prevent businesses from being exposed to frivolous litigation. The comments included a number of potential safe harbors, though the common theme was that when a recipient makes a number publicly available, that number should be deemed to have been

⁴⁸ *ACA Comments* at 7-8; *ABM Comments* at 6 (also providing counterexamples); *ASAE Comments* at 3-4; *Lorman Comments* at 17-18; *NAR Comments* at 3-4; *NFIB Comments* at 4; *MFC Comments* at 11-12.

⁴⁹ *NAR Comments* at 3.

voluntarily provided.⁵⁰ Thus, within the context of an EBR, safe harbors could include obtaining numbers from telephone books, public databases, public directories, advertisements, brochures, websites, and (when exchanged in the context of an EBR) letterheads, business cards, email footers, or any other publicly available source so long as the sender has a legitimate basis to believe the number was voluntarily made available.

D. Verifying an EBR Prior to July 9, 2005

With respect to the JFPA's grandfathering provision, the Notice sought comment on how the Commission should verify that an EBR was formed prior to July 9, 2005.⁵¹ Commenters widely agreed that the Commission should not attempt to provide strict criteria defining how such relationships could be verified.⁵² In particular, commenters argued that it would be difficult for the Commission to predict the various ways EBRs could potentially be verified.⁵³ Commenters also emphasized the significant burdens of complying with a specified record-keeping requirement.⁵⁴ Instead, commenters recommended that senders should be allowed to rely on general records kept in the ordinary course of business to verify the EBR's existence.⁵⁵ Finally, some

⁵⁰ *ABM Comments* at 6; *ARTBA Comments* at 2; *ASAE Comments* at 3; *Lorman Comments* at 17; *NFIB Comments* at 4; *Westfax Comments* at 7; *YPA Comments* at 2.

⁵¹ *Notice* at ¶ 11.

⁵² *ACA Comments* at 8; *American Bankers Association Comments* at 3; *ABM Comments* at 7; *AFSA Comments* at 3; *ASTA Comments* at 7-8; *Everett Comments* at 6-7; *HPC Comments* at 3; *NAR Comments* at 4-5; *NNA/NAA Comments* at 8-9; *Staples Comments* at 3-4; *MFC Comments* at 12. *But see Sutton Comments* at 4.

⁵³ *ACA Comments* at 8; *ABM Comments* at 7; *ASTA Comments* at 7-8.

⁵⁴ *Everett Comments* at 6-7; *MFC Comments* at 12.

⁵⁵ *AFSA Comments* at 3; *CTTC Comments* at 2-3; *NNA/NAA Comments* at 8-9; *MFC Comments* at 12.

commenters added that if the recipient had received a fax from the sender prior to July 9, 2005, then there should be a rebuttable presumption that the EBR existed.⁵⁶

The Coalition agrees with the commenters that the Commission should avoid imposing overly specific verification requirements. In addition to the arguments cited above, the Commission should take notice that senders already have strong incentives to maintain such records to avoid private litigation. If, however, the Commission still feels the need to provide guidance in this area, it should only establish safe harbors rather than specific record-keeping requirements.

III. THE RULE MUST INCLUDE A REALISTIC FRAMEWORK FOR MANAGING OPT-OUT REQUESTS.

The *Notice* also contemplates amendments to the fax rule to implement the opt-out provisions of the JFPA.⁵⁷ In particular, the Commission seeks comment on whether it is necessary to specifically define when an opt-out notice will be considered “clear and conspicuous,” on what would be appropriate “cost-free” mechanisms for opting out of future communications, and on whether non-profits or small businesses should be exempted from certain of these requirements. In addition, the Commission sought comment on numerous questions relating to the effect of an opt-out request, including: the length of time for senders to comply with the request, the appropriate methods by which an opt-out may be made, and the entities to which the opt-out should apply.

⁵⁶ *HPC Comments* at 3; *Staples Comments* at 3-4; *YPA Comments* at 3.

⁵⁷ *Notice* at ¶¶ 20-23.

A. Opt-Out Notice Specifications

Like virtually all commenters, the Coalition recognizes that the opt-out notice is an important component of the JFPA's opt-out scheme, and agrees that the Commission should adopt regulations relating to the use of these notices. The Coalition urges, however, that any regulations relating to opt-out notices should follow the core principle cited by virtually every business commenter in relation to this rulemaking: the requirements should be straightforward and readily understandable across the myriad industries and relationships that rely on fax communications.⁵⁸

Commenters offered a variety of proposals relating to the definition of "clear and conspicuous."⁵⁹ Although some of these proposals would be workable, the Coalition believes that the best approach would be for the Commission to adopt the definition it used in its mobile services commercial messages ("MSCM") rules, which simply provided that the notice "must be clearly legible, use sufficiently large type . . . and be placed so as to be readily apparent to a [recipient]."⁶⁰ That standard has served consumers and the Commission well, and it has been straightforward for senders to follow in practice. Importantly, adopting a uniform MSCM opt-out notice standard will significantly reduce compliance and administrative costs across a diverse range of industries and technologies. Further, such uniformity would, if necessary, allow for the development of a unified body of law interpreting the standard.

Commenters agreed that, pursuant to the JFPA, the Commission should require opt-out notices to include a "cost-free mechanism through which a recipient can

⁵⁸ See *NNA/NAA Comments* at 12.

⁵⁹ See, e.g., *NADA Comments* at 2; *Staples Comments* at 5-6.

⁶⁰ 47 C.F.R. § 64.3100(d)(6). See *NAR Comments* at 8.

communicate her opt-out preference. Because different industries have different ways of communicating with their constituencies, however, commenters provided a variety of specific cost-free mechanisms.⁶¹ The Coalition urges the Commission to recognize that senders need flexibility to define the opt-out mechanisms that are most efficient for them and their constituents. To that end, the Coalition agrees that it is important for opt-out notices to include a telephone or fax number to which requests may be sent, but urges the Commission to specify that this number need not be toll-free if the notice also includes an e-mail or web-based method by which recipients can opt-out.

In order to minimize compliance costs and to avoid exposing businesses to frivolous litigation, the Commission should provide guidance regarding what will be deemed a valid notice under the rules. However, rather than providing guidance in the form of rigid or overly formalistic notice requirements, the Commission should instead provide a non-exclusive safe harbor list, under which notices will be presumed to be valid. The Coalition recommends that the Commission conclude that an opt-out notice is sufficient if it includes: (a) an identification of the sender; (b) a statement that the recipient has the right not to receive future commercial fax messages from that sender; and (c) the telephone number, Internet address, or other mechanism by which the opt-out can be communicated. The Commission also should clarify that opt-out notices may include or exclude certain *additional* information, such as a statement of the amount of time permitted by the FCC for honoring of opt-outs, a statement that opt-outs are

⁶¹ See, e.g., *AHLA Comments* at 5 (24-hour toll-free telephone number, web site, or e-mail address); *Comerica Comments* at 2 (toll-free fax number, web site, or e-mail address); *DMA Comments* at 9-11 (local telephone, postcard, letter, web site, or e-mail); *NNA/NAA Comments* at 13-14 (local telephone number with answering machine or e-mail).

effective only if made using the mechanisms described in the notice, or a statement that the recipient has a right to rescind the opt-out and again receive fax messages from the sender.

Finally, the Commission asks whether non-profit organizations should be exempt from notice requirements and whether small businesses should be exempt from cost-free opt-out obligations. In order to reduce the burden of compliance on the entities least able to bear increased compliance costs associated with new requirements, those members of the Coalition that are non-profits encourage the Commission to exempt these organizations from these requirements.⁶²

B. Handling of Opt-Out Requests

The Commission's *Notice* also posed important questions about what effect a recipient's opt-out request should have. The *Notice* asked for comments on the time period within which a sender must comply with an opt-out request, on whether opt-outs sent to fax transmitter should apply to the business on whose behalf the fax was transmitted, and on whether methods other than those specified in the opt-out notice may be used to communicate opt-outs.⁶³

⁶² In its comments, the United States Small Business Administration Office of Advocacy requested that the FCC adopt a definition of small businesses for this purpose of 100 employees or fewer. *SBA Comments* at 5. The Coalition defers to the expertise of the Office of Advocacy on this issue, and urges the Commission to accept its recommendation. *See also Named State Broadcasters Association Comments* at 5-9; *ADAE Comments* at 7-9 (addressing notice exemption for non-profits).

⁶³ The Commission also sought comment on whether an opt-out terminates the EBR exemption. Although plainly an opt-out sent to a sender with whom a recipient has an EBR terminates the sender's ability to send further fax messages, the Commission should be careful to note that, as a logical matter, an opt-out does not terminate the established business relationship itself, which can continue notwithstanding the recipient's permanent or temporary preference not to receive faxes.

With few exceptions, commenters suggested that thirty days was the “shortest reasonable time” for senders to honor opt-out requests that they receive.⁶⁴ Although certain smaller organizations can honor opt-out requests in a shorter amount of time,⁶⁵ the Coalition believes that a one-month time frame is a reasonable overall limit for senders to honor opt-outs. As many commenters noted, it can reasonably take a month for senders to comply with an opt-out request, particularly in complex organizations or in situations where a sender uses an outsourcing firm to manage contact information or transmit faxes.⁶⁶ The Mortgage Finance Coalition’s comments also raised the important point that, because some months have 31 days, senders that update their organization-wide records on the first of every month could inadvertently violate the rule by sending faxes one day too late in months with 31 days.⁶⁷ For this reason, the Coalition recommends that the Commission define *the “shortest reasonable time” for honoring of opt-outs as 31 days*.

In addition, the *Notice* inquired whether opt-outs sent to a fax transmitter should apply to the underlying business on whose behalf the fax was transmitted.⁶⁸ The

⁶⁴ *ACA Comments* at 11-12; *ABM Comments* at 10; *ARTBA Comments* at 30; *ASAE Comments* at 5; *ASTA Comments* at 10; *Bank of America Comments* at 4; *CTTC Comments* at 2; *CBA Comments* at 12-13; *Countrywide Home Loans Comments* at 2; *DMA Comments* at 9; *Huntington Comments* at 5; *Independent Sector Comments* at 2; *IFDA Comments* at 4-5; *MFC Comments* at 14; *NAR Comments* at 8-9; *NADA Comments* at 2-3; *NFIB Comments* at 6; *NMHC Comments* at 2; *NNA/NAA Comments* at 13; *NEPA Comments* at 6-7; *SBA Comments* at 7; *Reed Elsevier Comments* at 9-10; *SIA Comments* at 5; *Staples Comments* at 6; *Westfax Comments* at 12.

⁶⁵ See, e.g., *SAG Comments* at 10 (10 business days); *Empire Corporate FCU* at 1 (10 days); *EPIC Comments* at 5-6 (5 days).

⁶⁶ See *supra* note 64.

⁶⁷ *MFC Comments* at 14.

⁶⁸ *Notice* at ¶ 25.

Coalition agrees that an opt-out request sent to a transmitter pursuant to an opt-out notice *should apply only to the sender on whose behalf the fax was transmitted*. Thus, opt-outs sent to a transmitter should *not* apply to *all* senders for whom that transmitter works. Because consumers commonly do not know that the sender has contracted with a fax transmitting service, such an arrangement would be contrary to the consumers' reasonable expectation. By sending an opt-out request, the consumer intends to opt-out of all faxes from the listed sender, not from other unlisted companies with whom the transmission company may happen to do business.⁶⁹

Finally, the Commission inquired whether senders must accept opt-out requests through methods other than those specified in the opt-out notice. The Coalition agrees with the many commenters that strongly opposed these additional obligations.⁷⁰ Managing opt-out requests is difficult for businesses, and particularly for larger organizations that may send faxes out of a variety of internal departments and geographic locations, or that use outside fax transmitter services. In order to comply with the JFPA, these organizations will have to incorporate complex compliance processes, whereby all opt-out requests will be collected at a central source and redistributed to be scrubbed against all lists maintained by entities of the organization which might send out faxes.

⁶⁹ *American Bankers Association Comments* at 5; *ABM Comments* at 13; *ASTA Comments* at 11; *NAW Comments* at 12; *NFIB Comments* at 7; *NNA/NAA Comments* at 15; *Westfax Comments* at 9. See also *EPIC Comments* at 7 (arguing that opt-outs sent to broadcaster should apply to the underlying sender, but that recipient should be able to opt out of faxes from the broadcaster if specifically requested); accord *CTTC Comments* at 3.

⁷⁰ *ARTBA Comments* at 3; *CBA Comments* at 13-14; *DMA Comments* at 8; *IFDA Comments* at 5. See also *ASTA Comments* at 11 (addressing opt-outs sent to a fax transmitter, rather than to the sender itself).

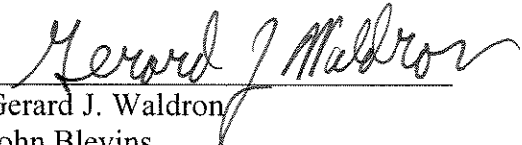
Even these complex procedures, however, assume that the organization can predict how and where the opt-out requests will be received. If, on the other hand, a recipient can provide an opt-out through methods not specified in the notice, the person who receives it may have no idea what it is, and the organization cannot even be assured of identifying and processing the request — and certainly not within the “shortest reasonable time” period required by the statute. In short, senders of legitimate commercial faxes are willing to work to ensure that recipients are able to opt-out of fax messages that they do not wish to receive. For those opt-outs to be successful, however, senders must be given the flexibility to design an internal opt-out process that works, and must be able to predict how and where the opt-out requests will arrive.

CONCLUSION

The members of the Fax Ban Coalition urge the Commission to work to eliminate unsolicited and unwanted fax messages, while also developing regulations which are narrowly tailored enough to avoid harming the business activities of legitimate senders of commercial faxes. The Coalition believes that its recommendations, if adopted, will be effective at combating unsolicited fax messages, but will honor Congress's intent that its regulation of commercial fax messages should not harm the American economy.

Respectfully submitted,

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APPENDIX A
MEMBERS OF THE FAX BAN COALITION

American Advertising Federation
American Bankers Association
American Business Media
American Dental Association
American Educational Institute, Inc.
American Electronics Association
American Express Company
American Hotel & Lodging Association
American Society of Association Executives
American Society of Travel Agents
American Supply Association
America's Community Bankers
Associated General Contractors of America
Association for Suppliers of Printing, Publishing & Converting Technologies
Association of Equipment Manufacturers
Association of National Advertisers
AstraZeneca
BellSouth
California Newspaper Publishers Association
Cendant Corporation
Chamber of Commerce of the United States
Coalition for Healthcare Communication
Community Associations Institute
Consumer Bankers Association
Consumer Electronics Association
Consumer Mortgage Coalition
Credit Union National Association
Dealer Track
Detroit Regional Chamber
Direct Marketing Association
First Empire Securities Inc.
Healthcare Distribution Management Association
Independent Insurance Agents & Brokers of America
International Association of Amusement Parks & Attractions
International Cemetery and Funeral Association
International Foodservice Distributors Association
International Franchise Association
Magazine Publishers of America
Mail 2 Media
Marathon Oil Corporation
Marlin Leasing Corporation
McGraw-Hill Companies (The)
Mortgage Bankers Association
National Association of Automobile Dealers

National Association of Fastener Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of Mortgage Brokers
National Association of Realtors
National Association of Wholesaler-Distributors
National Auctioneers Association
National Automobile Dealers Association
National Corn Growers Association
National Fastener Distributors Association
National Federation of Independent Business
National Funeral Directors Association
National Grocers Association
National Multi Housing Council
National Newspaper Association
National Restaurant Association
National Retail Federation
National Stone Sand & Gravel Association
New Jersey Chamber of Commerce
Newspaper Association of America
Ohio School Boards Association
Pennsylvania Steel Sales Corp
Premiere Global Services Inc.
Retired Enlisted Association
Right2Communicate.org
San Diego Employers Association
SmartVoice
Software & Information Industry Association
United States Telecommunications Association
Wine & Spirits Wholesalers of America
Xpedite Systems, LLC
Yellow Pages Association
Zurich North America

APPENDIX B
LIST OF COMMENTERS AND ABBREVIATIONS

The Reply Comments of the Fax Ban Coalition refer to comments filed by the following parties:

ACA	ACA International
ACB	America's Community Bankers American Bankers Association American Bar Association
ABM	American Business Media
AFSA	American Financial Services Association
AHLA	American Hotel & Lodging Association
ARTBA	American Road and Transportation Builders Association
ASAE	American Society of Association Executives
ASTA	American Society of Travel Agents, Inc.
ATA	American Teleservice Association
SAG	Attorneys General of Arkansas, Connecticut, Kentucky, and New Mexico Bank of America Robert Biggerstaff
CTTC	Coastal Training Technologies Corporation Comerica, Inc.
CBA	Consumer Bankers Association Countrywide Home Loans
DMA	The Direct Marketing Association, Inc.
EPIC	Electronic Privacy Information Center Empire Corporate Federal Credit Union
Everett	Everett Laboratories, Inc
HPC	Housing Policy Council of The Financial Services Roundtable
Huntington	The Huntington National Bank Independent Sector
IFDA	International Foodservice Distributors Association

Lorman	Lorman Educational Services
MFC	Mortgage Finance Coalition
	Named State Broadcasters Association
NAR	National Association of Realtors
NAW	National Association of Wholesaler-Distributors
NADA	National Automobile Dealers Association
NFIB	National Federation of Independent Business
NMHC	National Multi-Housing Council and National Apartment Association
NNA/NAA	National Newspaper Association and Newspaper Association of America
NEPA	Newsletter & Electronic Publishers Association
NAEDA	North American Equipment Dealers Association
SBA	Office of Advocacy, United States Small Business Administration
	Reed Elsevier, Inc.
SIA	Securities Industry Association
SHRM	Society for Human Resource Management
	Staples, Inc.
	Wayne G. Strange
	Jimmy Sutton
	Westfax, Inc.
YPA	Yellow Pages Association